

City of Poway Complaint

Supporting Document No. 3

Exempt from filing fees pursuant to Cal
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CITY OF POWAY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL DIVISION

CITY OF POWAY, a municipal corporation,)
)
 Plaintiff,)
)
 vs.)
)
 BILL MORITZ and LORI C. MORITZ,)
 individuals; and DOES 1 through 10, inclusive,)
)
 Defendants.)

CASE NO:)
)
 COMPLAINT FOR PRELIMINARY)
 AND PERMANENT INJUNCTION)
 AND NUISANCE PER SE)
 (CCP §§ 526, 527, and 731)

Plaintiff City of Poway alleges as follows:

1. At all times mentioned, Plaintiff, City of Poway ("City"), was and now is, a municipal corporation organized and existing under the laws of the State of California.
2. The City is informed and believes and, based on that information and belief, alleges that Defendants BILL MORITZ and LORI C. MORITZ, and Does 1 through 10 (hereinafter "Defendants"), are and at all relevant times were the owners of certain real property located at 14272 Jerome Drive in Poway, California, APN 321-040-49 (hereinafter "the property").
3. Defendants caused, participated in, or maintained the violations or the conduct alleged herein.
4. Does 1 through 10 are sued by fictitious names, because their true names and capacities are unknown to the City. The City alleges that each of the fictitiously named Defendants is in some way

1 responsible for the injury and damages sustained by the City or the conduct alleged below. The City
2 requests leave to amend this complaint to show the true names, capacities, and involvement of these
3 Defendants when that information is determined.

4 5. Each of the Defendants is and at all relevant times was the agent, servant, or employee of the co-
5 defendants and, in doing the things alleged below, was acting within the course and scope of authority
6 and with the permission and consent of the other Defendants.

7 6. In the exercise of the police power vested in it by the California Constitution, specifically Article
8 XI, Section 7, the City has enacted comprehensive building and zoning ordinances governing the
9 alteration, maintenance, construction, and use of structures and property. These ordinances can be found
10 in the Poway Municipal Code (hereinafter "PMC").

11 7. Since at least February 2008, Defendants have committed numerous violations of the Poway
12 Municipal Code. Defendants have violated the following sections of the Poway Municipal Code:

- 13 a. PMC § 16.42.010, Failing to obtain a grading permit;
- 14 b. PMC § 16.50.160, Failing to obtain a permit for grubbing and clearing of land;
- 15 c. PMC § 16.48.050, Failing to submit a haul route for import or export of earth material;
- 16 d. PMC § 16.50.040, Use of prohibited fill materials;
- 17 e. PMC § 16.50.050, Failing to compact fill materials;
- 18 f. PMC § 16.50.170, Failing to implement required erosion control;
- 19 g. PMC § 16.58.020, Depositing material in a watercourse;
- 20 h. PMC § 16.58.030, Altering or impeding the flow of water in a watercourse;
- 21 i. PMC § 16.43.070, Failing to comply with stop work notice.

22 (See Request for Judicial Notice ("RJN", Exhibit "A").

23 8. The City has declared by ordinance that violations of any of the City's codes, zoning codes, or
24 ordinances, constitute a nuisance. (PMC §§ 1.08.010(C); 8.72.020.) By violating the PMC, Defendants
25 have created a public nuisance on the property.

26 9. The Defendants have violated and continue to violate the PMC, despite numerous requests that
27 steps be taken to correct the violations and abate the nuisance.



RWQCB versus Bill and Lori Moritz
Tentative CAO R9-2008-0152



From Ex. 1

1. Storm-water erosion and sediment
2. Witch Creek Fires
3. More storm-water erosion and sediment
4. Rizzuto – City says “***Contour grading okay***”
5. Site work continued
6. Stop-Work Notice #1 – *Call Tadros*
7. Call to Tadros – City says “***No permit required***”
8. Stop-Work Notice #2 – *Call Lyon*
9. Call to Lyon – “***will call off dogs,***” meeting scheduled
10. Meeting with City about stone Creek
11. ***Stone creek design submitted April 2***
- 12 Discussion w/CE about pipe
13. **Streambed alteration agreement filed**
14. City letter – ***Finish work***
15. Moritz notice about intent to install pipe
16. **Pipe installed**
17. **RWQCB 1st at site**

Sep 2007 | Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | June

1/22/2009 Rizzuto rough

1 intent is that there will never be a structure, permitted

2 structure built on them or something that would require a

1/22/2009 Rizzuto rough

3 Q. He told you that he'd actually been down to the
4 city?

5 A. I couldn't tell you his exact phrasing of it, but
6 that he expressed an understanding of the limitations of
7 the ordinance at it applied to the work he was doing.

8 Q. Did you issue any stop work notice or citation?

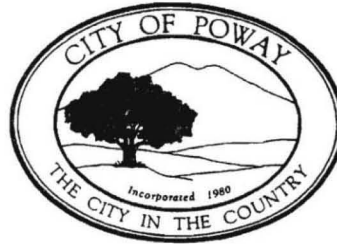
9 A. I did not.

10 Q. Why is that?

11 A. Again, because my opinion of the work that was
12 ongoing at that time was that it did not exceed the
13 criteria of the provisions for landscaping.

NOTICE

☒ STOP WORK
☐ CORRECT WORK



DATE: 2/7/08
PROJ: Jermine
14272

THIS PROJECT IS IN CONFLICT WITH THE FOLLOWING:

- ☐ STANDARD SPECIFICATIONS FOR PUBLIC WORKS CONSTRUCTION
- ☐ SAN DIEGO REGIONAL STANDARD DRAWINGS
- ☒ CITY OF POWAY GRADING ORDINANCE (1.)
- ☐ CITY OF POWAY WATER STANDARDS
- ☐ CITY OF POWAY SEWER STANDARDS
- ☐ OTHER: _____

THE AREA(S) OF CONFLICT IS:

Importing Fill w/out Haul A. permit.
Road is dirty & needs cleaned off - contractor grading &
scale of the house coral - Contact Sam Tadros @
City of Poway - @ 608 - 4601 ASAP -

Bill Moritz told to
contact Sam Tadros
about a haul permit

THE AREA(S) OF CONFLICT IS:

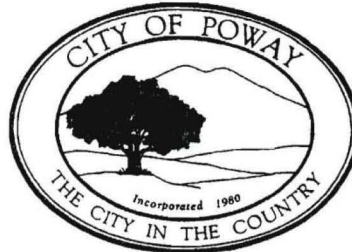
Importing Fill w/out Haul A. permit.
Road is dirty & needs cleaned off - contractor grading &
scale of the house coral - Contact Sam Tadros @
City of Poway - @ 608 - 4601 ASAP -

SEPARATE OFFENSE PUNISHABLE BY THE PROVISIONS OF THE ORDINANCE.

NOTICE

☒ STOP WORK

☐ CORRECT WORK



DATE: 2/7/08
PROJ: Ferme
1427C

THIS PROJECT IS IN CONFLICT WITH THE FOLLOWING:

- ☐ STANDARD SPECIFICATIONS FOR PUBLIC WORKS CONSTRUCTION
- ☐ SAN DIEGO REGIONAL STANDARD DRAWINGS

THE AREA(S) OF CONFLICT IS:

*Grading in an ephemeral stream
is not allowed. Please contact Town of Planning
prior to regrading the graded area to its original state
John Lyon the call 4/657*

THIS NOTICE WAS ISSUED TO:

CC:

DATE:

TIME:

BY:

TITLE:

PHONE:

Bill Montz

2/7/08

1:50 pm

Don Sharp

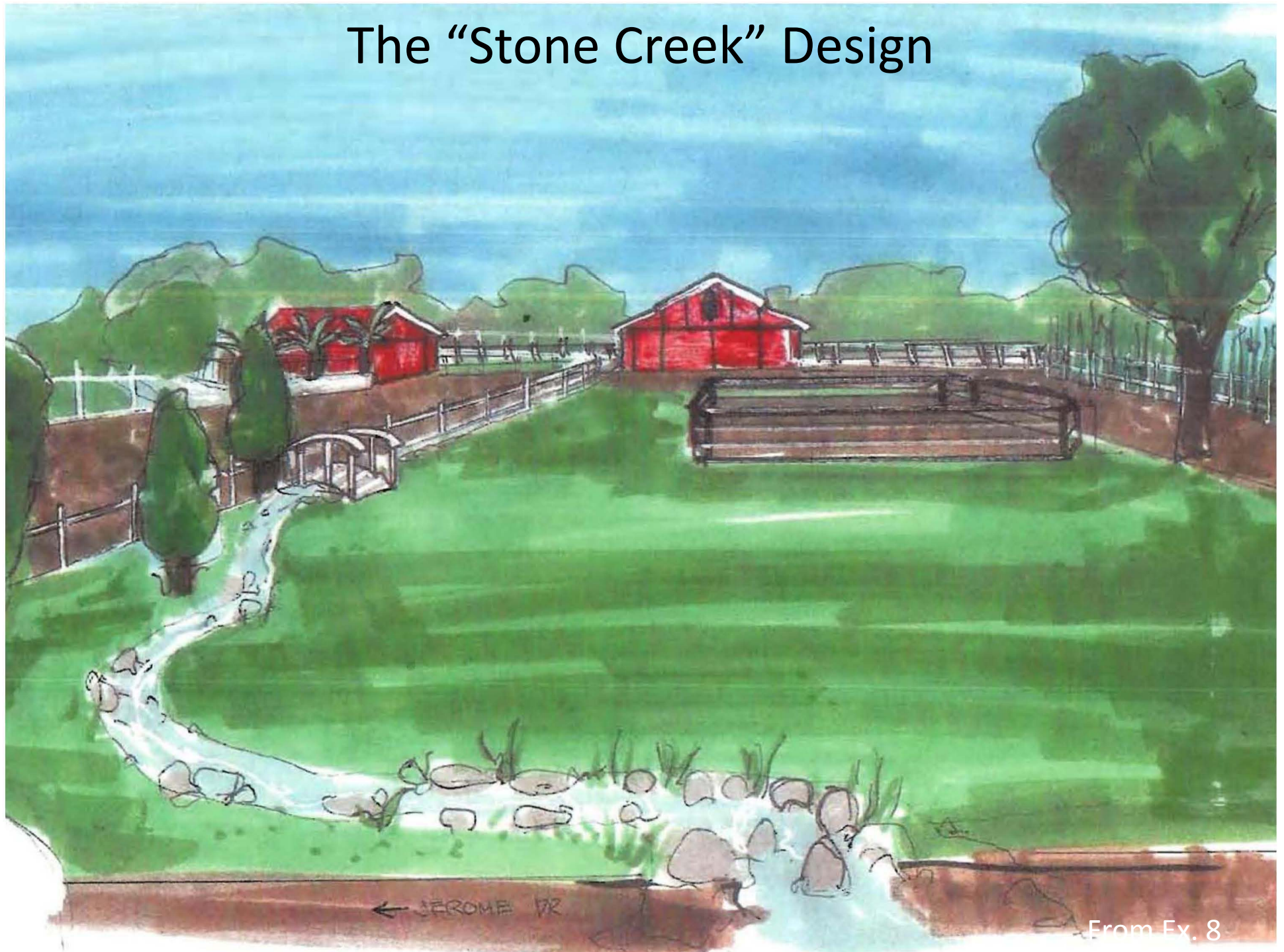
Construction Coordinator

858-472-0251

IF YOU HAVE FURTHER QUESTIONS, PLEASE CALL THE CITY OF POWAY'S DEVELOPMENT SERVICES DEPARTMENT AT THE ABOVE LISTED TELEPHONE NUMBER.

- (1.) A VIOLATION OF THE CITY OF POWAY'S GRADING ORDINANCE IS A MISDEMEANOR. EACH SEPARATE DAY OR PORTION THEREOF ON WHICH A VIOLATION EXISTS OR IS ALLOWED TO EXIST SHALL CONSTITUTE A SEPARATE OFFENSE PUNISHABLE BY THE PROVISIONS OF THE ORDINANCE.

The “Stone Creek” Design



Key Facts

1. Bill and Lori Moritz had scours and sediment on the property that required repair.
2. After the Witch Creek fires, they feared for their safety and for their property's safety.
3. Bill Moritz followed the stop work-orders by speaking with Messrs. Tadros and Lyon as required.
4. Bill Moritz and City discussed stone creek design in March, proposed it on April 2, but heard nothing
5. Bill Moritz sought permission on May 14 in his "Notification of Streambed Alteration" to install the pipe.
6. Bill Moritz understood that the May 19 City letter was a demand to proceed
7. Bill Moritz advised City that he planned to proceed with the pipe.
8. Pipe installed
9. Bill Moritz installed three straw wattles, RWQCB staff advised it needed more
10. Bill and Lori Moritz prepared a stream restoration plan
11. Bill Moritz installed additional straw wattles consistent with the plan, that RWQCB never observed
12. The economy crashed, and the Moritzes ran out of money – the resources to repair
13. RWQCB to date has not considered economics, discharger's resources in the tentative CAO

Legal Issue: May the Regional Board Regulate Ephemeral Streams?

CALIFORNIA CODES

CALIFORNIA WATER CODE

Division 7. WATER QUALITY

Chapter 2. DEFINITIONS

§ 13050.

As used in this division:

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

The Water Code does NOT expressly include ephemeral streams or dry washes that flow only intermittently – a few days each year -- in the definition of “waters of the state.”

- ***Is an ephemeral stream or a dry wash “surface water?”***
- ***Is an ephemeral stream or a dry wash “groundwater?”***
- ***Is an ephemeral stream or a dry wash any kind of water?***

“Water,” As Defined by Merriam Webster

1 a: the **liquid** that descends from the clouds as rain, forms streams, lakes, and seas, and is a major constituent of all living matter and that when pure is an odorless, tasteless, very slightly compressible liquid oxide of hydrogen H_2O which appears bluish in thick layers, freezes at $0^{\circ}C$ and boils at $100^{\circ}C$, has a maximum density at $4^{\circ}C$ and a high specific heat, is feebly ionized to hydrogen and hydroxyl ions, and is a poor conductor of electricity and a good solvent b: a natural mineral water —usually used in plural 2: a particular quantity or body of water: as a (1)*plural* : **the water occupying or flowing in a particular bed** (2)*chiefly British* : lake , pond b: a quantity or depth of water adequate for some purpose (as navigation) *cplural* (1): a band of seawater abutting on the land of a particular sovereignty and under the control of that sovereignty (2): the sea of a particular part of the earth d: water supply <threatened to turn off the water> 3: travel or transportation on water <we went by water> 4: the level of water at a particular state of the tide : tide 5: **liquid** containing or resembling water: as a (1): a pharmaceutical or cosmetic preparation made with water (2): a watery solution of a gaseous or readily volatile substance — compare ammonia water barchaic : a distilled fluid (as an essence) ; especially : a distilled alcoholic liquor c: a watery fluid (as tears, urine, or sap) formed or circulating in a living body d: amniotic fluid ; also : bag of waters 6 a: the degree of clarity and luster of a precious stone b: degree of excellence <a scholar of the first water> 7: watercolor 8 a: stock not representing assets of the issuing company and not backed by earning power b: fictitious or exaggerated asset entries that give a stock an unrealistic book value

RWQCB's Tentative CAO Finding #4

“4. The ephemeral stream watercourse is by definition a water of the State as defined by Section 13050(e) of the California Water Code (CWC).”

CALIFORNIA CODES

CALIFORNIA WATER CODE

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§ 13050.

As used in this division:

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

But the Water Code does not include ephemeral streams and dry washes as “waters of the state.”

United State Supreme Court case: *Rapanos v. United States*, 547 U.S. 715 (2006)

The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral— through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States." *Id.* at 722.

The restriction of "the waters of the United States" to **exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams,"** "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, **the Corps has stretched the term "waters of the United States" beyond parody.** The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction. *Id.*, at 733-34.

Reasonable conclusion: ephemeral streams and dry washes are not “waters of the state.”

- Water Code definition does not include dry washes and ephemeral streams (unless flowing);
- *Rapanos* Court’s rationale precludes the extension of waters of the state;
- Commonsense meaning and statutory construction suggests that water means water, not land
- Waters of the State are not involved here, so RWQCB should refuse to adopt CAO R9-2008-0152

Legal issue: Was there a discharge of “Waste?”

Tentative CAO finding:

“6. The unauthorized discharge of **waste** by Dr. Moritz is in violation of CWC Sections 13260(a) and 13264(a) which require that any person discharging **waste** or proposing to discharge **waste** within any region, other than to a community sewer system, which could affect the quality of the waters of the State, shall file a report of waste discharge (ROWD). The discharge of dredged or fill material may constitute a discharge of waste that could affect the quality of waters of the State.”

CALIFORNIA CODES

CALIFORNIA WATER CODE

Division 7. WATER QUALITY

Chapter 2. DEFINITIONS

§ 13050.

As used in this division:

(d) "**Waste**" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and **for purposes of, disposal.**